Citation: *HL v Canada Employment Insurance Commission*, 2024 SST 139

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	H. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 27, 2023 (GE-22-3973)

Tribunal member:	Janet Lew
Decision date:	February 14, 2024
File number:	AD-24-34

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, H. L. (Claimant), is seeking leave to appeal the General Division decision. The General Division dismissed the Claimant's appeal. The General Division found that the Claimant had not shown that she was available for work for a period of nine days, between June 13, 2022, and June 24, 2022. As a result, the Claimant was disentitled from receiving Employment Insurance benefits for this timeframe.

[3] The Claimant argues that she was available for work. She argues that the General Division made jurisdictional, procedural, legal, and factual errors.

[4] In particular, the Claimant argues that the General Division failed to properly apply the law and overlooked some of the evidence. She says that the evidence shows that she wanted to return to the labour market as soon as a suitable job was offered. She also says that the evidence shows that she did not set any personal conditions that limited her chances of returning to the labour market.

[5] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with the appeal.

---

[1] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division made a jurisdictional or procedural error?

b) Is there an arguable case that the General Division failed to properly apply the law?

c) Is there an arguable case that the General Division made perverse or capricious findings or that it overlooked some of the evidence?

I am not giving the Claimant permission to appeal

[8] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[9] For this type of factual error, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[4]

The Claimant does not have an arguable case that the General Division made a jurisdictional or procedural error

[10] The Claimant does not have an arguable case that the General Division made a jurisdictional or procedural error. Although the Claimant argues that the General Division made these types of errors, she has not identified any.

– Jurisdictional errors

[11] A jurisdictional error involves the General Division either exceeding its authority or failing to make a decision that it should have made. The Claimant had appealed the

[3] See section 58(1) of the DESD Act.
[4] See section 58(1)(c) of the DESD Act.

reconsideration decision of the Respondent, the Canada Employment Insurance Commission (Commission), on the availability issue.[5] The General Division addressed the availability issue. It did not consider any other matters. I am not satisfied that there is an arguable case that the General Division made a jurisdictional error.

– **Procedural errors**

[12] A procedural error involves the fairness of the process at the General Division. It is not concerned with whether a party feels that the decision is unjust. Parties before the General Division enjoy rights to certain procedural protections such as the right to be heard and to know the case against them, the right to timely notice of hearings, and the right to an unbiased decision-maker.

[13] The Claimant does not allege that she did not receive all of the file materials, that she did not receive adequate notice of the hearing, or that she did not know the case she had to meet. There is no indication either that the General Division did not give the Claimant a fair hearing or a reasonable chance to present her case. There is no suggestion of bias either.

[14] I am not satisfied that there is an arguable case that the General Division process was unfair or that the General Division member did not act fairly.

The Claimant does not have an arguable case that the General Division failed to properly apply the law

[15] The Claimant does not have an arguable case that the General Division failed to properly apply the law. She agrees that the General Division applied the correct legal test to prove availability. It had to analyze three factors: the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the

[5] See Notice of Appeal, at GD2. The Claimant included materials with her appeal indicating that she was also appealing the reconsideration decision on the misconduct issue. The General Division issued separate decisions for each issue: on availability, misconduct, and on antedating.

chances of returning to the labour market. But she argues that the General Division erred in how it applied the law to the facts of her case.

[16] The Claimant argues that the fact that she returned to work for her employer as soon as it called her back proves that she was available for work. The Claimant denies that she set any personal conditions. She argues that external factors — "the social level of coercion"[6] and few employment opportunities because of her stance against COVID-19 vaccination — created barriers that limited her chances of being able to return to the labour market.

[17] The General Division addressed each of these considerations. The Claimant is essentially arguing that the Appeal Division should reassess the evidence in her favour. But, as the Federal Court of Appeal has determined, there is no legal or factual error merely because a claimant disagrees with how the General Division might have applied settled legal principles to the facts of a case. The Court wrote:

> A disagreement with the application of settled principles to the facts of a case does not afford the SST-AD the basis for intervention. Such a disagreement does not constitute an error of law or a factual finding made in a perverse or capricious manner or without regard to the evidence.[7]

[18] As the Federal Court has consistently held, it is beyond the Appeal Division's scope to reassess or reweigh the evidence in order to reach a different conclusion from the General Division, when determining whether to grant or deny leave to appeal.[8] As the Federal Court also stated, in another case, the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."[9] I see no reason to depart from these firmly established principles.

---

[6] See Claimant's Application to the Appeal Division - Employment Insurance, at AD 1-8.
[7] See *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[8] See, for instance, *Tracey v Canada (Attorney General)*, 2015 FC 1300.
[9] See *Hussein v Canada (Attorney General)*, 2016 FC 1417.

[19] As the Claimant has not pointed to any discernible legal errors, I am not satisfied that there is an arguable case that the General Division failed to properly apply the law.

The Claimant does not have an arguable case that the General Division made perverse or capricious findings or overlooked some of the evidence

[20] The Claimant does not have an arguable case that the General Division made perverse or capricious findings or overlooked some of the evidence.

[21] The Claimant says that the General Division failed to consider the factors that led her to expect that her employer would shortly be lifting its vaccine requirements. She says that this expectation led her to understand that it would not be very long before her employer would be recalling her for work. She says that this showed that she was available for work because she had a desire to return to work.

[22] The Claimant also says that because she could expect her employer to recall her to work, it would have been unreasonable to do anything that could jeopardize returning to her employment. In other words, she saw little justification to conduct much of a job search, beyond filing grievances and doing whatever it took to get her job back. She also ordered books to retrain for a secondary career, as this would not jeopardize returning to her employment.

[23] Under the circumstances, the Claimant did what she felt was reasonable to facilitate an early return to work. She avoided looking for other work so she could ensure being able to return to her employer.

[24] The General Division did not detail each of these factors, but as a decision-maker, it is not required to refer to all of the evidence before it, as it is presumed to have been considered.[10]

[25] Besides, the General Division recognized the Claimant's efforts and desire to return to her employment. However, the General Division found that the Claimant had

[10] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

not conducted a broader job search. This finding was consistent with the evidence before it and the Claimant does not challenge this particular finding that her efforts were focussed on returning to her employment. Hence, it cannot be said that the General Division overlooked this evidence.

[26] The General Division determined that, despite these considerations, the Claimant's job search efforts and desire to return to the workforce had to be broader and not restricted to returning to her employment. As I have determined above, essentially the Claimant is seeking a reassessment of the evidence. But that is not appropriate nor within my scope of authority in an application for leave to appeal.

[27] In *Walls*, the Federal Court of Appeal described the test for the factual errors falling within section 58 of the *Department of Employment and Social Development Act*.

> This Court has held that a perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence (*Garvey v Canada (Attorney General)*, 2018 FCA 118, [2018] FCJ No 626 (QL) at para 6). … [T]his Court explained that the notion of "perversity" has been interpreted as "willfully going contrary to the evidence". The notion of "capriciousness" or of the factual findings being made without regard to the evidence would include "circumstances where there was no evidence to rationally support a finding or where the decision-maker failed to reasonably account at all for critical evidence that ran counter to its findings." [11]

[28] The General Division's findings were supported by the evidence before it. It did not fail to account for any critical evidence.

[29] The evidence explained why the Claimant did not conduct a broader job search. Even so, the General Division found that it did not excuse the Claimant from focussing on returning to her employment. She still had to show that she was making broader efforts to find a suitable job for the purposes of being available for work under the *Employment Insurance Act*.

---

[11] See *Walls v Canada (Attorney General)*, 2022 FCA 47 at para 41.

[30] I am not satisfied that there is an arguable case that the General Division made perverse or capricious findings or overlooked some of the evidence.

Conclusion

[31] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division